# French Response to COVID-19 Crisis: Rolling into the Deep*

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## Introduction – From Exception to Exceptions

To cope with the COVID-19 crisis, the French Parliament adopted the Act n° 2020-290 creating a new regime of exception: the state of health emergency. It is concerning as it confers more powers and large leeway to the executive branch than the traditional state of security emergency, and as it offers the opportunity to restrict widely rights and liberties with almost no checks and balances.

The following elements must be recalled:

- From 14 November 2015 to 31 October 2017: application of the state of security emergency;
- Since 30 October 2017: normalisation of the rules established by this state of security emergency with the Act n° 2017-1510, amended by the Act n° 2020-1671 of 24 December 2020;
- From 23 March 2020 to 9 July 2020: first implementation of the state of health emergency (activation by Act n° 2020-290 that creates the regime & prorogation by the Act n° 2020-946);
- From 10 July 2020 to 17 October 2020: application of the Act n° 2020-856 organising the way out of the state of health emergency;
- Since 16 October 2020: revitalisation of the spirit of the state of security emergency following the assassination of Samuel Paty;
- From 17 October 2020 to 1st June 2021: second implementation of the state of health emergency (declaration by Decree n° 2020-1257 & prorogation by Act n° 2020-1379 & Act n° 2021-160).

The extension of exceptional states at the expense of legal normality is worrying, as the adequacy, the necessity and the proportionality of the measures adopted in order to tackle the COVID-19 crisis are disputed. According to Mireille Delmas-Marty (here), we can observe a normative insanity that results in an expansion and escalation of the restrictions of rights and freedoms. Executive acts have been adopted in a frenetic manner and modified on a weekly basis (Paul Cassia, here). A legal insecurity appears to allegedly promote an irrational illusion of physical security while substantially limiting rights and liberties (France Culture, *Le temps du débat*, here & here).

To expose how security-focused the management of the sanitary crisis is in France, the paper evokes the creation of the new emergency regime (1), the limitation of rights and freedoms by the executive (2), and the weaknesses of the institutional oversight (3).

# 1 – The Expansion of Exceptional Regimes

The French Parliament adopted on 23 March 2020 the Act n° 2020-290 creating a new emergency powers regime. This was activated by the same Act and extended by Act n° 2020-946 until 9 July 2020. Yet the first measures that aim at coping with the COVID-19 crisis were adopted under legal bases already available in the French normal legal order. Thus, the creation of this exceptional regime which allows deep and wide restrictions of rights and freedoms leads by itself to important concerns.

***Was This New Emergency Regime Necessary?***

The Health Minister adopted the Decree n° 2020-247 of 14 March 2020 which prohibited large social gatherings. Then, the Prime Minister, the Health Minister and the Home Affairs Minister established a nationwide lockdown adopting the Decree n° 2020-260. Therefore, the necessity of creating a new exceptional regime was doubtful (Sébastien Platon, here). Indeed, the legal need of a state of health emergency is controversial and the practical implementation of this one is divisive. Yet the Government chose to create the new regime of the state of health emergency, arguing that the health emergency powers enounced in Article L.3131-1 of the Public Health Code provides the Health minister and not the Prime Minister with the authority to adopt 'any measure […] in order to prevent and limit the consequences of possible threats to the health of the population'. The vague wording of this article has been criticized by Stéphanie Renard in her PhD Thesis.

It is under the accelerated legislative procedure that the French Parliament adopted the Emergency Response to the COVID-19 Epidemic Act n° 2020-290. Some measures are designed to cope with the epidemic; others give the Government the power to adopt the urgent measures necessary to mitigate the economic fallout of the pandemic; and others postpones the second round of the municipal elections. Under the Act n° 2020-290, 94 executive orders have been adopted so far in domains which would normally fall within the competences of the Parliament, some reforming the judicial procedure (Ordinance n° 2020-303, Decree n° 2020-427, Ordinance n° 2020-557) and the administrative one (Ordinance n° 2020-305, Ordinance n° 2020-405, Ordinance n° 2020-558) in a very preoccupying way (Paul Cassia, here). The new exceptional regime is enounced in Articles 1 to 8 of the Act (Art. L. 3131-14 to Art. L. 3131-12 CSP).

***How Exceptional is the Exception?***

The state of health emergency has been applied twice: 1) from 23 March 2020 to 9 July 2020 (Act n° 2020-290 & prorogation by Act n° 2020-946); 2) since 17 October 2020 (Decree n° 2020-1257 & prorogation until 1st June 2021 by Act n ° 2020-1379 & Act n° 2021-160). Different elements reveal how the exceptional has become normal: the appearance of a new exceptional regimes (the state of health emergency and the regime organising the way out of the state of health emergency); the successive prorogations of the state of health emergency; the normalisation of the new state of health emergency regime with the prorogation of its

second application by the presentation by the Government of a legislative proposal to establish a permanent health crisis management regime.

Many scholars criticize such normalisation of the state of health emergency implementations and regime such as Stéphanie Renard (here & here) or Paul Cassia (here & here). Indeed the circumstances of the epidemic are not unexpected and are not putting in danger the core elements of the nation (François Saint-Bonnet, here). Yet considering that the state of health emergency aims at eradicating the epidemic results in making the exception permanent. Meanwhile, the means the emergency regime offers to the executive are numerous and intense that diminish, even extinguish, rights and liberties.

# 2 – The Escalation of the Executive Powers

According to Art. L.3131-15 CSP, when and where the state of health emergency is declared, the Prime Minister disposes of ten powers:

1. Restrict or prohibit the movement of people and vehicles;
2. Prohibit people from leaving their homes;
3. Order quarantine of persons likely to be affected;
4. Order isolation of persons affected;
5. Order the temporary closure of establishments open to the public;
6. Limit or prohibit gatherings on public pathways;
7. Order requisition of all goods and services necessary to tackle the health emergency;
8. Take temporary control of the prices to prevent or correct tensions on the market;
9. Take all measures to make available appropriate medicines to patients;
10. Take by decree any other regulatory measure limiting rights and freedoms.

***How Deeply can Rights and Freedoms be Tamed?***

Under the state of health emergency, the administration can adopt not only individual measures but also general measures, and the tenth superpower of the list gives the executive a quasi '*carte blanche'*. Such an exceptional regime leads to massive restrictions on rights and freedoms : Decree n° 2020-293 established the first lockdown, forbade all movements and transports of persons, prohibited all gatherings, imposed the closure of all non-essential activities, closed the education establishments – elementary, secondary and superior -, controlled the price of some goods – such as hand sanitizer -, requisitioned masks for health professionals); Decree n° 2020-337 extended the requisition of all the products that will be necessary to health facilities – i.e. medicines, painkillers, antibiotics; Decree n° 2020-370 modified the two previous texts deepening the restrictions of rights and liberties; Decree n° 2020-1257 declared the second state of health emergency); Decree n° 2020-1310 issued measures needed to cope with the COVID-19 epidemic, on a way similar to Decree n° 2020-293.

A paradoxical situation emerges as the measures taken by the administration to promote security have expanded a legal insecurity: the instability of the applicable legal corpus has been nourished by a normative proliferation of multi-layered measures adopted at the different administrative levels, and by the constant modification of all the previously mentioned measures (i.e. Decree n° 2020-1262 of 16 October 2020 prescribing the general measures necessary to deal with the covid-19 epidemic within the framework of the second state of health emergency has been amended eleven times so far). The most invasive measures taken were the lockdowns and curfews, which greatly affect the individual liberties of the French population.

The most striking illustration of these invasive powers was the national lockdowns, the first from 17 March to 11 May 2020, and the second from 30 October 2020 to 15 December 2020 (Paul Cassia analyses it as arbitrary deprivation of liberty of all French people, here). The curfew has been used by the French authorities (from 8 pm to 6 am from 15 December 2020 to 15 January 2021 at the exception of Christmas day; and from 6 pm to 6 am since 16 January 2021). The rights and freedoms affected are henceforth numerous: individual liberty (decisions of quarantine and isolation), freedom of association (prohibition of gatherings and assemblies), freedom of expression (interdiction of demonstrations), freedom of religion (limitations of services), freedom of education (closure to the public of universities, theatres, museums), freedom of movement (auto authorisations were necessary during the two lockdowns, whose absence was criminalised with penalties up to 6 months of prison and 3 750 € fine for repeating offenders), freedom of commerce (closure of non-essential establishments like bars, restaurants, sport facilities).

***Are Serfs Less Likely to Get Infected by the Virus?***

This title sounds deeply provocative, yet it seems genuinely accurate to highlight the fact that most of the population agreed to extensive and massive restrictions of their rights and freedoms, pretending to be henceforward protected against the virus. In the name of saving one life, the rights and freedoms of all are restrained, suspended, affected, people accepting this new reality due to the perceived sanitary risk (Ulrich Beck's book on *Risk Society*). But they don't realise that the real the danger that threatens them is the establishment of a *Voluntary Servitude* (the famous *Discourse* Etienne de la Boétie published in 1562) as Peggy Avez's book demonstrates (here). In other words, the population passively agreed to become less free citizens under an overwhelming executive power, allegedly, refusing to face the reality of both the incapacity of the authorities to cope with the epidemic and the tendency of these very authorities to reinforce their executive powers so much giving a leeway to an authoritarian drift of the regime.

Meanwhile, authorities seem to have been unable to effectively tackle the sanitary crisis: they reveal how weedy they are as they tend to manage the crisis only by symbolic postures, irrationally believing in the performativity of their own discourses, announces, pledges (i.e. the issues relative to the supply and distribution of masks, respirators, tests, vaccines). Hence the security-focused answer to the sanitary crisis the French executive adopts must be questioned. Are security measures

better than sanitary polities to cope with an epidemic? The answer is obviously negative according to Paul Cassia (here). Of course, the foremost concerns relate to the compatibility of the measures adopted with constitutional, European, and international instruments protecting human rights. The *Commission Nationale Consultative pour les Droits de l'Homme* published several opinions relative to the state of health emergency considering the requirements of the rule of law (here), the necessity of a normal functioning of justice (here), the right of education (here), the regime organising the way out of the state of health emergency (here). Another institution, the *Défenseur des droits*, expressed deep concerns related to the limitations of rights and freedoms, especially for the most vulnerable persons (opinion 20-03).

# 3 – The Weakness of Genuine Institutional Control

The political and judicial scrutiny of the measures adopted by the executive to manage the COVID-19 epidemic has been really poor. It must be recalled here that all the restrictions to rights and freedoms were completed in an already deteriorated situation of the rule of law in France, since the country lived during two years under the state of security emergency. Moreover many provisions then adopted were encapsulated in ordinary law (Act n° 2017-1510 of 30 October 2017 whose provisions which were supposed to end on 31 December 2020, but were prorogued by Act n° 2020-1671). The state of health emergency is indeed characterised by upsetting shortcomings, as the imbalance is patent between the importance of the powers conferred to the executive authorities and the paleness of safeguards both in terms of parliamentary oversight and of judicial review.

***What Occurred to the Balance of Powers?***

Art. L.3131-13 § 1 CSP reveals that the Parliament's powers are more limited under this state of health emergency than under the state of security emergency. First, its prorogation must be authorised by the Parliament beyond one month and not 12 days. Second, the Act of Parliament extending the state of emergency doesn't lapse at the end of a period of fifteen days following the date of resignation of the Government or dissolution of the National Assembly. Third, the executive and administrative authorities are not required to transmit to the Houses copies of all the acts they adopt. Yet, the Parliament did not seem eager to exercise an in-depth control: a simple 'information mission' was established, whose oversight was not significant (first report & second one) and whose dissolution was decided on 27 January 2021.

Though the Parliament was operational during the states of heath emergency, the scrutiny the assemblies have exercised on the way the executive manages the sanitary crisis is paltry and scrawny. This results from the situation of the political concordance of the executive branch and the parliamentary majority (*le fait majoritaire*), which has been reinforced by the 2008 constitutional reform. The use and abuse of the accelerated procedure by the government shows the tendency of the executive to devalue Parliament, as Elina Lemaire highlights it (here & here).

***Is the Judge at the Service of the Government?***

The judicial review of the measures adopted under the state of health emergency also reveals deficiency. The issue results firstly from the manner the Constitutional council exercises its role. In performing its *ex ante* constitutional scrutiny, the French constitutional judge refused to develop an in-depth control, to genuinely scrutinize the respect of the principles of constitutionality, necessity and proportionality (the French Constitutional judge does not consider the compatibility of legislative norms with international provisions). It asserted the measures fulfil the requirements as the goal to achieve the preservation of public health is of general interest (DC n° 2020-800, DC n° 2020-803, DC n° 2020-808). Yet, in two *ex post* decisions, the Council declared unconstitutional some provisions of the Ordinance n° 2020-303 of 25 March 2020: those which allowed that the trial of prosecuted people without their agreement to be realised by videoconference before criminal courts or juvenile courts (Decision n°2020/872 QPC); those which provided for the extension of all pre-trial detentions that expire during a first state of public health emergency without any judicial intervention, nevertheless excluding decisions of remand from being challenged (Decision n° 2020-878/879 QPC).

Similarly, the French supreme administrative judge appeared to develop a minimum control (*contrôle de l'erreur manifeste d'appréciation*) in a degraded manner. The decisions issued on 6 September 2020 are illustrative (Ord. n° 443750, Ord. n° 44351): an administrative police measure (which imposes the compulsory wearing of a mask in any public space) is considered legal insofar that its simplicity and its clarity are useful to ensure the population knows the considered obligation and applies it correctly, without taking into consideration its necessity and proportionality (Paul Cassia's analysis here). Moreover, inconsistencies appeared in the jurisprudence of the administrative judge, relatively to the Decree 2020-1310 re-establishing the lockdown which forbade all public gatherings: the *Conseil d'Etat* demanded the government to nuance its measures regarding assemblies in churches (Ord. n° 446930 & alii); but refused to do the same for universities (Ord. n° 447015) and theatres (Ord. n° 447698).

# Conclusion – Rolling (Rights and Freedoms) Into the Deep

The security-focused management of the sanitary crisis in France needs to be questioned in Michel Foucault's terms (*Surveiller et punir*, Gallimard, 1975), as the state of health emergency offers to the executive the opportunity to establish a concerning *panopticon*, and as the power of the *Raison d'Etat* is expanding when becoming the *Raison de la santé*. Furthermore, the French answer to the sanitary crisis has created a sanitary crisis (as well as a socio-economic one) that results not from the COVID-19 epidemic but from the response to tackle this one the authorities have applied.

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